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Pat O'Meara

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BEARY LANDSCAPING, INC. v. COSTIGAN: THE CASE FOR REPEALING THE ILLINOIS PREVAILING WAGE ACT

Pat O'Meara^{*}

TABLE OF CONTENTS

INTRODUCTION	390
I. THE ILLINOIS PREVAILING WAGE ACT	391
A. <i>The Origin of the Illinois Prevailing Wage Act</i>	391
B. <i>Historic Cases Regarding the Constitutionality of the Act</i>	393
1. <i>Bradley v. Casey</i>	393
2. <i>Hayen v. Ogle County</i>	394
II. LANDSCAPING UNDER THE PREVAILING WAGE ACT	395
A. <i>Background</i>	395
B. <i>The State Law Challenge to the Act's Classification of Landscapers as "Laborers"</i>	396
C. <i>The Failed Non-Delegation Challenge to the Act in Beary v. Costigan</i>	398
III. THE PREVAILING WAGE ACT: A PUBLIC CHOICE PERSPECTIVE	401
A. <i>The Lack of Meaningful Judicial Review Under Section 9</i>	401
B. <i>Comparing the Illinois Prevailing Wages Act to the Prevailing Wage Acts of Other States</i>	403
C. <i>Applying Public Choice Theory to the Prevailing Wage Act</i>	405
1. <i>Agency Capture</i>	405
2. <i>Concentrated Groups, Diffuse Groups, and Information Costs</i>	406
3. <i>Defining and Measuring the Prevailing Wage</i>	408
D. <i>Counter-Arguments</i>	409
1. <i>The Prevailing Wage Act as Labor Subsidy</i>	409
2. <i>The Race to the Bottom</i>	410
3. <i>No Impact on Costs</i>	411
CONCLUSION	413

^{*} J.D., Northwestern University School of Law, 2014; B.A., University of Missouri-Columbia, 2008. Special thanks to all the editors of the Northwestern Journal of Law & Social Policy that helped prepare this note for publication, to my parents, and to my girlfriend, Brittany.

INTRODUCTION

In the district court opinion that would form the basis of the appeal in *Beary Landscaping, Inc. v. Costigan*, Judge James Zagel remarked that “[p]laintiffs have produced some eyebrow-raising figures that suggest that Defendant [Catherine Shannon, then the director of the Illinois Department of Labor] is doing no favors for the taxpayers of the State of Illinois.”¹ He then elaborated in a footnote:

To take just one example, on Federal and private landscaping projects undertaken in Cook County, the going rate for a “landscape helper” in June 2010 was \$11.50 per hour in total compensation. The same person working a state-funded project would receive a total hourly compensation package of \$52.70—that is, 458% of the comparable federal or private rate.²

The disparity in those two figures is shocking, though it is not representative of the average disparity between Illinois rates and private or federal rates for every worker classification. However, it does bring into focus the artificiality of the concept of a prevailing wage and elucidate one of the perils of employing price controls in the labor market.

A primary reason for the difference in the two wages is that Illinois does not distinguish between landscapers and ordinary laborers.³ Another relates to the fact that the Illinois Prevailing Wage Act, like many prevailing wages laws, does not recognize a category of workers called “helpers.”⁴ Using helpers to do much of the “grunt work” on a job, while simultaneously giving them a chance to learn the trade, is one thing that non-union contractors do to control costs because helpers are paid much less than union journeymen.⁵ But the unions seem to exert enough influence in Illinois to have prevented the legal recognition of helpers in the Illinois Prevailing Wage Act, thus requiring the state to pay a landscaping helper as much as a laborer.

This Note uses the Seventh Circuit’s recent decision in *Beary Landscaping, Inc. v. Costigan* as an occasion to analyze the Illinois Prevailing Wage Act (“Prevailing Wage Act” or “Act”). In *Beary*, a group of ten landscaping contractors sought to enjoin the director of the Illinois Department of Labor from

¹ *Beary Landscaping, Inc. v. Shannon*, 2011 WL 1100213, at *3 (N.D. Ill. 2011), *aff’d sub nom*, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 354 (2012).

² *Id.* at *6 n.1.

³ See *infra* subpart III(A).

⁴ See George C. Leef, *Prevailing Wage Laws: Public Interest or Special Interest Legislation?*, 30 CATO J. 137, 145 (2010).

⁵ *Id.* (internal quotation marks omitted).

setting the prevailing wage rate by relying on the rates in the collective bargaining agreement of the union historically relied on for wage rates.⁶ The contractors argued that this amounted to an unconstitutional delegation of legislative authority to private parties.⁷ Though they did not succeed, *Beary* revealed serious problems with the Prevailing Wage Act.

This Note will first discuss how the Act functions. Then, it will detail the challenges brought by the group of landscaping contractors in *Beary* and in *Illinois Landscape Contractors Ass'n v. Department of Labor*, an Illinois Appellate Court decision that effectively dictated *Beary's* outcome. It will proceed with an application of public choice theory to the Prevailing Wage Act, arguing the Act is a quintessential example of interest group legislation that benefits a concentrated group at the expense of a diffused group. Central to this point is a unique provision in the Act that allows only wages paid on public works projects to be used in the calculation of the prevailing wage.⁸

Ultimately, this Note addresses how incentive structures inherent in the law invite governmental largesse, if not outright corruption. The best solution is simply to repeal the Act, particularly because the courts have made it clear they have no interest in fixing the legislature's mess.⁹ This Note suggests that, if the law is to be retained at all, the Illinois Department of Labor (IDOL) should be required to conduct scientific wage surveys using data from private and public works when calculating the wage rates. Furthermore, a new classification should be added for landscaping helpers that continue to be subject to the Prevailing Wage Act.

I. THE ILLINOIS PREVAILING WAGE ACT

A. *The Origin of the Illinois Prevailing Wage Act*

During the New Deal, Congress passed the Davis-Bacon Act, requiring that the prevailing wage be paid to all workers on federally funded public works projects.¹⁰ Though Congress's exact reasons for passing the law are unclear, it

⁶ See *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 354 (2012). The Department used to conduct wage surveys and compare them to the rates submitted, but has admittedly not conducted any such survey since 2001. See *infra* subpart III(B).

⁷ See *Beary*, 667 F.3d at 949-50 (7th Cir. 2012).

⁸ 820 ILL. COMP. STAT. ANN. 130/2 (West 2008).

⁹ The Illinois Landscape Contractors Association and similarly minded organizations should concentrate their efforts on a democratic solution to their prevailing wage woes rather than waste more resources on a judicial one.

¹⁰ Herbert R. Northrup & Augustus T. White, *Subsidizing Contractors to Gain Employment: Construction Union 'Job Targeting'*, 17 BERKELEY J. EMP. & LAB. L. 62, 77-78 (1996).

appears to have been part of a scheme of Keynesian deficit spending in response to the Great Depression.¹¹ The arguably sensible rationale was that, in its attempt to boost incomes and thereby increase consumer spending, the government should not pay laborers less than what they usually made.¹²

Many states passed similar laws for state-funded public works projects, which became known as “Little Davis-Bacons.”¹³ The Prevailing Wage Act is Illinois’ “Little Davis-Bacon.”¹⁴ It has been suggested that the state versions of the Davis-Bacon Act were based less on a coherent economic program than on a general desire to help labor.¹⁵ Specifically, scholars suspect that the primary purpose of enacting the state prevailing wage laws was to ensure that white union workers received government contracts; the laws undercut the incentive to hire minorities who underbid them.¹⁶ Whatever their origin, prevailing wage laws draw criticism for almost uniformly setting the prevailing wage at or near union scale.¹⁷

Little has been written about the origins of the Prevailing Wage Act. The first two attempts to enact a prevailing wage act in Illinois were struck down by the Illinois Supreme Court on constitutional grounds.¹⁸ The legislature successfully passed the Prevailing Wage Act on its third attempt. That version of the Act endures, though it has been subjected to a considerable number of amendments.¹⁹ One such amendment, passed in 1961, added statutory language that makes the current Prevailing Wage Act very different from its federal

¹¹ See *id.*

¹² *Id.*

¹³ *Id.* at 80.

¹⁴ See generally Sarah Glassman, et. al., *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, BEACON HILL INST. AT SUFFOLK U. (2008), available at <http://www.beaconhill.org/BHISStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf>.

¹⁵ *Id.*

¹⁶ See, e.g., David Bernstein, *The Shameful, Wasteful History of New York’s Prevailing Wage Act*, 7 GEO. MASON U. C.R. L.J. 1 (1997); Editorial, *Sop for Labor: Saving Davis-Bacon*, CHI. TRIB., April 17, 1995, available at http://articles.chicagotribune.com/1995-04-17/news/9504170003_1_davis-bacon-act-unions-compliance-costs. But see Hamid Azari-Rad & Peter Philips, *Thoughtless Think Tanks: Sound Bite Thinking and The History and Intent of Prevailing Wage Law*, in THE ECONOMICS OF PREVAILING WAGE LAWS (2005).

¹⁷ RICHARD VEDDER, MACKINAC CENT. FOR PUB. POL’Y, MICHIGAN’S PREVAILING WAGE LAW AND ITS EFFECTS OF GOVERNMENT SPENDING AND CONSTRUCTION EMPLOYMENT (1999), available at <http://propertytaxrepeal.com/Misc Info/PW combined.pdf>.

¹⁸ See *Bradley v. Casey*, 114 N.E.2d 681, 683 (Ill. 1953) (“The first prevailing wage act enacted in 1931 was declared unconstitutional the same year. . . . In 1939, a second prevailing wage act was passed and it was declared unconstitutional in 1940.”); *Mayhew v. Nelson*, 178 N.E. 921, 924 (1931) (holding that the law was unconstitutional for delegating legislative powers to administrative officers and vagueness); *Reid v. Smith*, 30 N.E.2d 908, 912-13 (1940) (voiding law on substantive economic due process grounds).

¹⁹ See *Bradley*, 114 N.E.2d at 683.

counterpart and from the wage laws of most states²⁰ in that it limits the data used in the government's calculations of the prevailing wage to wages paid "on public works."²¹

B. Historic Cases Regarding the Constitutionality of the Act.

The Illinois Supreme Court has twice dealt with constitutional challenges to the wage determination procedures under the Act. In *Bradley v. Casey*, the court held that an amendment unconstitutionally delegated legislative authority to private parties²² and, in *Hayen v. Ogle County*, it held that the Act's language meant that private wages could not be considered when calculating the prevailing wage rate.²³ These cases helped shape the arguments in *Beary*.

1. Bradley v. Casey

In *Bradley*, a taxpayer challenged the 1951 Amendment to the Prevailing Wage Act, which set the prevailing wage in any trade according to the rates contained in a collective bargaining agreement.²⁴ The court held the provision unconstitutional on the grounds that it delegated a legislative function to private parties.²⁵ It worried that this wage-setting process "permit[ted] the fixing of the standard rather than finding or ascertaining an existing fact."²⁶

It is not difficult to see why the plaintiffs in *Beary* were tempted to draw on this line of argument. In their petition for certiorari, they noted that the language was removed from the statute but that "IDOL never changed its procedure," and that it still "engaged in the same deference to the parties negotiating CBAs that the Illinois Supreme Court ruled unconstitutional in 1953."²⁷ This is not entirely true, since IDOL conducted some wage surveys in

²⁰ See *infra* subpart IV(B).

²¹ 820 ILL. COMP. STAT. ANN. 130/2 (West 2008) ("The terms 'general prevailing rate of hourly wages', 'general prevailing rate of wages' or 'prevailing rate of wages' when used in this Act mean the hourly cash wages plus fringe benefits for training and apprenticeship programs approved by the U.S. Department of Labor, Bureau of Apprenticeship and Training, health and welfare, insurance, vacations and pensions paid generally, in the locality in which the work is being performed, to employees engaged in work of a similar character *on public works*."') (emphasis added).

²² 114 N.E.2d 681, 685 (Ill. 1953).

²³ 463 N.E.2d 124, 125-26 (Ill. 1984).

²⁴ *Bradley*, 114 N.E.2d at 682.

²⁵ *Id.* at 685.

²⁶ *Id.*

²⁷ Petition for Writ of Certiorari at 23, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947 (7th Cir. 2012), cert. denied, 133 S. Ct. 354 (2012) (No. 12-129).

the period between *Bradley* and *Beary*, but it does accurately describe its practice in the last decade.²⁸

2. *Hayen v. Ogle County*

In 1961, the Prevailing Wage Act was amended to define the “prevailing rate of wages” as “the hourly cash wages plus fringe benefits . . . in the locality in which the work is being performed, to employees engaged in work of a similar character *on public works*.”²⁹ The amendment set the prevailing wage at union scale in many cases, and this upset the Ogle County government. Thus, it simply ignored the “on public works” language and continued including private wages in its prevailing wage calculations.³⁰ Angered by the government’s deliberate eschewal of the law, union representatives filed an objection that led to a brief hearing where it was determined that the prevailing wage would be calculated using both public and private wages.³¹ The union representatives appealed to the circuit court, and won.³²

The Ogle County government appealed all the way to the Illinois Supreme Court, raising a number of constitutional objections to the Act, which were all rejected.³³ The unifying thread of Ogle County’s claims was that the Act was “arbitrary and irrational,” and was therefore unconstitutional on substantive due process grounds. Unimpressed, the Court noted that the county’s objections were properly made to the legislature and not the courts.³⁴ The court held that the Act was rationally related to the legitimate state interest of “having the work performed under conditions which give some assurance that the work will be completed without interruptions or delay by workmen of average skill.”³⁵

²⁸ See *infra* subpart III(A).

²⁹ See *Hayen v. Ogle County*, 463 N.E.2d 124, 125 (Ill. 1984) (emphasis added).

³⁰ *Id.* at 126.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 126-29.

³⁴ *Id.* at 128 (“We hold that the Prevailing Wage Act does not violate the due process clause, for it bears a rational relationship to a legitimate State interest. . . . Although the contractors complain about the deleterious consequences of this legislative scheme, these effects simply are a result of the legislature’s decision to stabilize labor conditions on public works projects by creating a prevailing wage base. Whether or not the legislature’s scheme is worth the price, the Prevailing Wage Act is constitutional under the minimum-rationality standard of the due process and equal protection clauses.”).

³⁵ *Id.* (quoting *Bradley v. Casey*, 114 N.E.2d 681, 686 (Ill. 1953)) (internal quotation marks omitted).

II. LANDSCAPING UNDER THE PREVAILING WAGE ACT

A. Background

Whether landscaping work falls within the scope of the Prevailing Wage Act has been a subject of some contention over the last decade. Some municipalities and contractors were unsure whether they were required to pay the prevailing wage when they hired companies for landscaping work, which they considered maintenance and not a form of construction.³⁶ Michael Janois, the village manager of Mount Prospect, Illinois, lamented what he viewed as a new interpretation of the Act—arguing that requiring the prevailing wage for landscaping “is like a backdoor unfunded mandate,” and estimating it would cost the Village an additional \$790,000.³⁷

Mystified that municipal governments were confused about the applicability of the prevailing wage to landscaping projects, IDOL added a reminder on its website in 2011.³⁸ Its stance is that landscaping work has always been within the scope of the Prevailing Wage Act.³⁹ The Act defines “construction” as “all work on public works involving laborers, workers or mechanics. This includes any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented.”⁴⁰ Maintenance can be read to include landscaping, so IDOL’s position may be reasonable. But some, like Janois and Larry Frang, executive director of the Illinois Municipal League, claim that enforcement of the Prevailing Wage Act has expanded recently to include maintenance work that was previously exempt.⁴¹

³⁶ See *Political Struggle Over Prevailing Wage Act*, IRRIGATION & GREEN INDUSTRY (Jan. 30, 2012), http://www.igin.com/article-2617-political_struggle_over_prevailing_wage.html.

³⁷ *Id.*; see also Madhu Krishnamurthy & Steve Zalusky, *State Act Could Mean Higher Landscaping Costs for Suburbs*, THE DAILY HERALD (Jan. 23, 2012), <http://www.dailyherald.com/article/20120123/news/701239874/.html>.

³⁸ Krishnamurthy & Zalusky, *supra* note 37 (“Though some municipal officials may not have been aware of it, Illinois Department of Labor spokeswoman Anjali Julka said landscaping and other maintenance work paid for through public funds always has been included under the Prevailing Wage Act. ‘In 2011, the Illinois Department of Labor had emphasized through a reminder on its website of the inclusion of landscaping in relation to public works projects, public funding and improvement of public property to help avoid any confusion and misinterpretation,’ Julka said.”).

³⁹ *Id.*

⁴⁰ 820 ILL. COMP. STAT. ANN. 130/2 (West 2008).

⁴¹ Krishnamurthy & Zalusky, *supra* note 37. Janois noted that he attended a seminar held by an IDOL representative who claimed that basically any maintenance work, except custodial work, that requires a screwdriver falls within the scope of the Act, and that tree planting and removal also fell within the scope of the Act because it “changes the landscape.” *Id.*

Local governments are required to adopt the wage rates annually.⁴² Members of some of those governments, like Burr Ridge, have used the annual adoption as an opportunity to publicly condemn the law.⁴³ A few years ago, officials in Rolling Meadows, Illinois symbolically refused to adopt the Act, even though the village continued to pay the wage rates required by the state.⁴⁴ In 2007, the Heartland Institute noted that there was a “grassroots rebellion brewing in Illinois,” and that several Adams County officials questioned the validity of the state’s wage rates and had begun determining their own home rule rates.⁴⁵ Adams County is not alone. Resistance to the Act among municipalities seems to have intensified in the last few years, with more and more municipalities conducting their own wage surveys and preempting the state law with home rule rates.⁴⁶ There has also been increasing support for attempts of groups like the Illinois Landscape Contractors Association to fight the law in the courts and legislature.⁴⁷

B. The State Law Challenge to the Act’s Classification of Landscapers as “Laborers”

In order to understand *Beary*, one must first look to the earlier decision of *Illinois Landscape Contractors Ass’n v. Department of Labor*, which involved some of the same plaintiffs involved in *Beary*.⁴⁸ Justice Bowman’s opinion explains IDOL’s current practice of ascertaining the prevailing wage, details how the Act is arguably broken, and points out how the name of the Prevailing Wage Act seems at odds with how it functions in reality.

In *Illinois Landscape Contractors Ass’n v. Department of Labor*, a group of landscaping contractors appealed an unsuccessful challenge to their classification as “laborers.”⁴⁹ Pursuant to Section 9 of the Act, the Illinois Landscape Contractors Association (ILCA) had previously challenged the classification in an

⁴² See 820 ILL. COMP. STAT. ANN. 130/2 (West 2008). Apparently, this provision is distinctive. See David Denholm, *Prevailing Wage Controversy Continues*, HEARTLANDER MAGAZINE (Nov. 1, 2007), <http://news.heartland.org/newspaper-article/2007/11/01/prevailing-wages-controversy-continues> (“[Illinois] has an unusual provision in its prevailing wage law requiring all local government agencies to resolve to adopt the state prevailing wage or determine their own.”).

⁴³ Sandy Illian Bosch, *Despite Objections, Burr Ridge Passes Prevailing Wage*, THE DOINGS WEEKLY, July 29, 2012 (on file with author) (noting that the board passed the resolution “begrudgingly,” and that Trustee Al Paveza described the current wage rates as “almost outrageous”).

⁴⁴ Kate Gibson, *Lack of Wage Rule Angers Residents*, CHI. TRIB., Aug. 14, 2003, at A6.

⁴⁵ Denholm, *supra* note 42.

⁴⁶ See Krishnamurthy & Zalusky, *supra* note 37 (citing Naperville as an example of a town that has preempted the law by conducting surveys and setting its own rates).

⁴⁷ *Id.*

⁴⁸ 866 N.E.2d 592 (Ill. App. Ct. 2007).

⁴⁹ *Id.* at 595.

administrative hearing before IDOL—seeking to establish the new categories of “plantsman,” “lead plantsman,” and “landscape installer.”⁵⁰

Part of the impetus for this challenge was a change in 2004 of the union to which most workers and contractors performing landscape work belonged.⁵¹ Formerly represented by the Laborers Union, the contractors and laborers chose joint representation by Local 150 of the Operating Engineers Union and Teamsters Union Local 703.⁵² The contractors and laborers entered into a new collective bargaining agreement with those unions (the Landscape CBA), which differed from their former agreement in that it adopted a separate wage schedule for landscape workers that included “wages up to \$15.62 per hour.”⁵³

At the time of ILCA’s challenge, “the prevailing wage for laborers working on public projects subject to the Prevailing Wage Act was \$36.72 per hour in wages and benefits.”⁵⁴ Part of the contractors’ motivation in switching unions was to escape the wage rates in their collective bargaining agreement with the Laborers Union. But IDOL does not accept new classifications simply because it is presented with a new collective bargaining agreement. Instead, the party petitioning for a new classification must prove at a Section 9 hearing that the work involved in the proposed category is “sufficiently dissimilar” from work involved in all existing classifications to merit the inclusion of a new one.⁵⁵

At ILCA’s Section 9 hearing, Carla Pulley testified about IDOL’s wage-setting process. Pulley described her position as “a certifying officer with the Conciliation and Mediation Division” of the Department of Labor, who is responsible for ascertaining and publishing the prevailing wage rates for the construction trades.⁵⁶ Pulley indicated that IDOL used to conduct surveys to determine the prevailing wage for each trade, but that no such survey has been conducted since 2001. Instead, the department simply sets the prevailing wage rate at the rates established in the collective bargaining agreement of one union per trade.⁵⁷ For landscaping, IDOL has historically used the rates set by the Laborers Union, and the administrative law judge who presided over the hearing was not convinced that landscape work was sufficiently dissimilar to the work of “laborers” to merit a new classification.⁵⁸

⁵⁰ *Id.*

⁵¹ *Id.* at 594.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 596; 820 ILL. COMP. STAT. 130/4(e) (2008).

⁵⁶ *Ill. Landscape Contractors Ass’n*, 866 N.E.2d 592, 597 (Ill. App. Ct. 2007).

⁵⁷ *Id.*

⁵⁸ *Id.* at 597-600.

Justice Bowman, writing for the court, was unimpressed with ILCA's arguments on appeal and affirmed the judgment of the administrative law judge.⁵⁹ Justice Bowman did opine briefly, however, on the peculiarity of the law.

Hayen and the Prevailing Wage Act itself present this court with a test of counterintuition, as one would think that the 'prevailing wages' would reflect the average prevailing wages paid to employees on projects across the public and private sectors. Even the federal government adopts such an interpretation, as ILCA points out.⁶⁰

Still, Justice Bowman pointed out the futility of what ILCA sought to accomplish by asking that new wage classifications be recognized:

In this case, following the Prevailing Wage Act and *Hayen* leads to disjointed reasoning. Landscape workers are currently covered by [IDOL's] laborer classification and getting paid approximately \$36 per hour on public works projects. [I]DOL cannot consider what landscape workers are paid on private sector projects in determining wages or a new classification. Therefore, even if [I]DOL recognized this new class, it could not lower the hourly wage, because its research would be limited to the \$36 per hour that landscape workers are paid on *public works* projects rather than the lower wages they are paid on private sector jobs. While this is counterintuitive, it is the current outcome under *Hayen* and the Prevailing Wage Act.⁶¹

In sum, even if the court had agreed with ILCA's argument that a new category was warranted, the result ultimately would have been the same because the court held that the findings of the agency were reasonable under the quite deferential "clearly erroneous" standard of review.⁶²

C. The Failed Non-Delegation Challenge to the Act in Beary v. Costigan

⁵⁹ *Id.* at 604.

⁶⁰ *Id.* at 603.

⁶¹ *Id.*

⁶² *Id.* at 600 ("While the agency is awarded deference, a reviewing court will reverse the agency decision when there is evidence supporting reversal and the reviewing court is left with the definite and firm conviction that a mistake has been committed." (internal quotation marks omitted)).

In *Beary*, ten landscaping contractors had been faced with state court enforcement actions for violating the Prevailing Wage Act⁶³ that were stayed when the defendant-contractors joined together to challenge the constitutionality of the Act in federal court under an obscure offshoot of the non-delegation doctrine.⁶⁴ The Prevailing Wage Act requires that IDOL make annual findings every June about the current prevailing wage rates for each trade in a given locality.⁶⁵ Once the department makes these findings, any affected party is allowed thirty days to challenge the findings in a Section 9 hearing.⁶⁶ As discussed above, IDOL's current method of ascertaining the wage is to look to the collective bargaining agreement of the union historically relied upon for the relevant category of laborer.⁶⁷ The plaintiffs in *Beary* argued that by merely rubber-stamping the wages submitted by unions, IDOL had unconstitutionally delegated a governmental function to private parties.⁶⁸

Although winning a non-delegation challenge would have been very difficult regardless, Judge Posner's opinion in *Beary* shows that he did not understand the mechanics of the Act well enough to understand the crux of the plaintiff's futility defense to their failure to exhaust administrative remedies.⁶⁹ Judge Posner acknowledged that the plaintiffs were not objecting to the determination in *Illinois Landscape Contractors Ass'n v. Department of Labor*, but thought they were objecting to IDOL's rubber-stamping of the wage rates in the Laborers Union agreement as the prevailing wage for "plantsmen."⁷⁰ In the opinion, he describes the plaintiffs' objection as follows: "Maybe plantsmen on public projects are actually paid a different wage, and that different wage is the prevailing wage for such workers."⁷¹

⁶³ *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 949 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 354 (2012).

⁶⁴ *Id.*; see also 735 ILL. COMP. STAT. ANN. 5/2–619(a)(3) (West 2008) (permitting a stay when another action is pending between the same parties involving the same claim).

⁶⁵ *Beary*, 667 F.3d at 948 (noting that the rates for each trade are usually broken down by county).

⁶⁶ *Id.*; 820 ILL. COMP. STAT. 130/9 (2008) ("At any time within 30 days after the Department of Labor has published on its official web site a prevailing wage schedule, any person affected thereby may object in writing to the determination or such part thereof as they may deem objectionable by filing a written notice with the public body or Department of Labor, whichever has made such determination, stating the specified grounds of the objection.").

⁶⁷ See *supra* subpart III(B).

⁶⁸ *Beary*, 667 F.3d at 949-50.

⁶⁹ See *id.* at 950.

⁷⁰ *Id.*

⁷¹ *Id.* Posner had already noted that the plaintiffs' challenge was based on "an offshoot of the constitutional nondelegation doctrine that is applicable to the states [and] forbids them to authorize private persons to deprive other private persons of life, liberty, or property without due process of law." *Id.*

But this statement frames the issue incorrectly. The only way plantsmen could be paid a different wage on public works projects would be for contractors to violate the terms of the Prevailing Wage Act.⁷² Since the department refuses to consider evidence of wages paid on public works projects that violate the Prevailing Wage Act, it would literally be impossible for the plaintiffs to present evidence at the Section 9 hearing that plantsmen were in fact paid a different wage on public works projects sufficient to prove that IDOL's findings were wrong.⁷³ For that reason, the contractors argued that the prevailing wage rates had become a self-fulfilling prophecy, which made raising such objections to the agency futile.⁷⁴

Nonetheless, the court refused to excuse the plaintiffs' failure to exhaust administrative remedies by requesting a Section 9 hearing because, "if the plaintiffs' challenge succeeded, . . . the Department would be required to recalculate the wage."⁷⁵ Here too, the court was wrong. As the court in *Illinois Landscape Contractors Ass'n v. Department of Labor* explained, "plantsman" does not exist as a category, so the plaintiffs' challenge would be limited to showing that the wage for "laborer" is wrong while the department could simply point to the Laborers Union agreement to conclude that the wage determination was reasonable. Furthermore, even if IDOL were to consider whether the wages paid to plantsmen differed from those paid to laborers, the result would be the same because (1) the calculation would be limited to wages paid on public works projects, and (2) the wages paid on public works projects are dictated by the prevailing wage for laborers.⁷⁶

Ultimately, the Seventh Circuit upheld the district court's decision.⁷⁷ In the opinion, Judge Posner noted that the administrative and judicial remedies afforded to the plaintiffs proved they were not denied due process.⁷⁸ Furthermore, Judge Posner explained that the thirty days the Act provides for the filing of an objection

⁷² The district court opinion shows that Judge Zagel understood this point. *See* *Beary Landscaping, Inc. v. Shannon*, 2011 WL 1100213, at *5 (N.D. Ill. 2011), *aff'd sub nom*, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 949 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 354 (2012) ("Plaintiffs contend that seeking relief from the wage determinations in these Section 9 hearings is 'futile,' because '[o]nce IDOL certifies and publishes the rates in a CBA, IDOL considers payment of any wage or fringe benefit at a lower rate unlawful and refuses to consider evidence of payment of any such lower rate in any hearing under Section 9.' If wage determination challenges were deemed final and unreviewable at that point, Plaintiffs might have a case that the state process is constitutionally deficient. But they are not: the [Act] explicitly provides for judicial review on top of the administrative process.").

⁷³ *Id.*

⁷⁴ *See Beary*, 667 F.3d at 949.

⁷⁵ *Id.* at 952.

⁷⁶ *See supra* subpart III(B).

⁷⁷ *Beary*, 667 F.3d at 953.

⁷⁸ *Id.* at 952.

to wage determinations was so proximate to the wage determination that it “make[s] the challenge proceeding part of the wage-setting process rather than process belatedly bestowed after an unconstitutional delegation is complete.”⁷⁹ The plaintiffs petitioned for certiorari on July 23, 2012,⁸⁰ but were denied on October 1, 2012.⁸¹

III. THE PREVAILING WAGE ACT: A PUBLIC CHOICE PERSPECTIVE

Beary illustrates the problems inherent in limiting prevailing wage calculations to wages paid for public works projects. In particular, the opinion highlights how IDOL’s method of calculating the prevailing wage renders administrative and judicial review of wage determinations meaningless. Part IV first lays out how the restriction of prevailing wage calculations to wages paid on public works projects precludes meaningful judicial review. Then, it compares Illinois’s definition of the prevailing wage to those of other states with labor-protective prevailing wage acts to show that Illinois is alone in restricting its wage measurement to wages paid for public works projects. Finally, it introduces a public choice perspective on interest group legislation and agency capture to shed light on what is happening in Illinois.

A. *The Lack of Meaningful Judicial Review Under Section 9*

The *Beary* plaintiffs chose to pursue their challenge before they exhausted the administrative remedies available to them under Section 9 of the Act.⁸² As such, the way was clear for the court to disregard the as-applied constitutional challenge. The plaintiffs claimed that challengers in a Section 9 hearing face an insurmountable burden because the determinations are a self-fulfilling prophecy and, therefore, a Section 9 hearing was not worth the plaintiffs’ time or effort in challenging wage determinations.⁸³ In turn, the plaintiffs’ attempt to justify their failure to exhaust administrative remedies reveals a troubling public policy problem.

A lack of meaningful judicial review of these plaintiffs’ claims sounds like fertile ground for a due process challenge. But the bar for due process is quite low and a Section 9 hearing clears it easily. Due process requires only notice, and a

⁷⁹ *Id.* at 953.

⁸⁰ Petition for Writ of Certiorari, *supra* note 27, at 23.

⁸¹ See *Beary Landscaping, Inc. v. Costigan*, 133 S. Ct. 354 (2012).

⁸² *Beary*, 667 F.3d at 951-953.

⁸³ Brief for Appellant at 13-14, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 354 (2012) (No. 11-1920). The plaintiffs made also an entirely unconvincing argument that they were not “affected” by the rates until IDOL commenced an enforcement action against them, which is a creative but wrong interpretation of 820 ILL. COMP. STAT. 130/9 (2008).

chance to object (in person or in writing) to the action being taken.⁸⁴ Because the Act allows plaintiffs to request a Section 9 hearing, and to grumble about the injustice of the Prevailing Wage Act, no due process violation occurs. Even if the Act's review procedures meet the constitutional minimum, however, they still leave much to be desired.

Recall *Illinois Landscape Contractors Ass'n v. Department of Labor*, where landscape contractors pursued a Section 9 hearing to request that IDOL recognize a new classification for landscaping work.⁸⁵ The court pointed out that the "on public works" language led to "disjointed reasoning."⁸⁶ But even if the court *were* to recognize landscaping work as a new category, what would that mean? As the court noted, the prevailing wage for landscape workers would be measured by what they had been paid on public works projects. This means the data used to determine the wage rate for the new classification would reflect what these workers were paid under the previous classification of "laborer." In short, even if a challenger wins at a Section 9 hearing, and forces IDOL to create a new classification, the challenger still loses.

Furthermore, even when challenging a wage determination for an existing category, the procedure in a Section 9 hearing is a bit of a sham—at least insofar as it is supposed to guard against agency capture or manipulation of wages by the unions. Suppose that a contractor raises a timely objection to the wage for laborers. The only evidence the court will be allowed to consider is evidence of what was paid on public works contracts that complied with whatever the prevailing wage was the last time the agency made findings.⁸⁷ This can hardly be said to safeguard against unions gaming the system, as one union did in *General Electric Co. v. New York Dep't. of Labor* when it included two rates in its collective bargaining agreement: one rate for private works, and another rate for public works that was nearly double the former rate.⁸⁸ Nothing in the Illinois system of review prevents unions from inflating the wage rates on public works above rates paid on private works through similar, or more discreet, arrangements.

Requiring IDOL to use private wages in the calculation of the prevailing wage would solve this problem; it would remove the possibility of unions gaming the system by setting a different price for public works projects than for private

⁸⁴ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); see also *Michalowicz v. Vill. of Bedford Park*, 528 F.3d 530, 535 (7th Cir. 2008) ("[W]e should not reject [a state-law remedy as inadequate] unless the remedy . . . can readily be characterized as inadequate to the point that it is meaningless or nonexistent and, thus, in no way can be said to provide the due process relief guaranteed by the fourteenth amendment.").

⁸⁵ 866 N.E.2d 592 (Ill App. Ct. 2007).

⁸⁶ *Id.* at 603.

⁸⁷ See *supra* notes 72–73 and accompanying text. Contrary to what is dictated by the statute, the prevailing wage is typically updated several times a year. *Id.*

⁸⁸ 936 F.2d 1448, 1453–57 (2d Cir. 1991).

ones. And when a new classification is created, such as a classification for landscape work, the department will look at what landscapers are actually paid to determine what the prevailing wage is instead of asking the absurd question of what workers previously classified as “laborers” were paid on public works projects.

B. Comparing the Illinois Prevailing Wages Act to the Prevailing Wage Acts of Other States

It is useful to compare the Illinois Prevailing Wage Act to the Little Davis-Bacon in other states. A.J. Thieblot conducted a comparative analysis of state prevailing wage laws, grouping them into three different categories by their relative strength: “weaker,” “average,” and “stronger.”⁸⁹ Illinois was in the “stronger” category along with Missouri, Rhode Island, Ohio, Michigan (whose laws were briefly held unconstitutional), Minnesota, Washington, Hawaii, California, New Jersey, New York, and Massachusetts.⁹⁰ A comparison of Illinois with other states that have relatively strong prevailing wage acts reveals first, that the level of deference to unions in Illinois is unusually high, and second, that *none* of the other states limit the calculation of their prevailing wage rates to wages paid on public works projects.

The Illinois Prevailing Wage Act is peculiar in that the statutory language suggests that surveys must be conducted, though in practice surveys have not been conducted since 2001 when IDOL began relying on the rates set in collective bargaining agreements. Six of the other “stronger” prevailing wage act states use collective bargaining agreements that, in some cases, are subject to stipulations: California,⁹¹ Massachusetts,⁹² Michigan,⁹³ New Jersey,⁹⁴ New York,⁹⁵ and Ohio.⁹⁶

⁸⁹ See A.J. Thieblot, *Prevailing Wage Laws and Black Employment in the Construction Industry*, J. OF LAB. RES., 154, 158 n.6 (1999).

⁹⁰ *Id.*

⁹¹ See CAL. LAB. CODE § 1773 (West 2011) (“In determining the rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates *established by collective bargaining agreements* and the rates that may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where the rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved.” (emphasis added)); see also *Indep. Roofing Contractors v. Dep’t of Indus. Relations*, 28 Cal. Rptr. 2d 550, 557 (1994) (“The statutory scheme contains express safeguards to prevent such delegation from occurring. The Department is allowed to rely on a collective bargaining agreement as a basis for a determination only where the agreement is evidence of ‘the rates actually prevailing in the locality.’”).

⁹² See MASS. GEN. LAWS ANN. ch. 149, § 26 (West 2004) (“[I]f, in any of the towns where the works are to be constructed, a wage rate or wage rates have been established in certain trades and occupations by *collective agreements or understandings* in the private construction industry

Three conduct surveys and use the modal rate: Hawaii,⁹⁷ Minnesota,⁹⁸ and Missouri.⁹⁹ Washington defines the prevailing wage as the wage paid to a

between organized labor and employers, the rate or rates to be paid on said works shall not be less than the rates so established; provided further, that in towns where no such rate or rates have been so established, the wages paid to mechanics, teamsters, chauffeurs and laborers on public works, shall not be less than the wages paid to the employees in the same trades and occupations by private employers engaged in the construction industry.” (emphasis added)); *see also* Constr. Indus. of Mass. v. Comm’r of Labor & Indus., 546 N.E.2d 367, 373-74 (1989) (holding that the use of a collective bargaining agreement to set the prevailing wage for Teamsters was not an unconstitutional delegation of power to private parties).

⁹³ *See* MICH. COMP. LAWS ANN. § 408.554 (West 1999) (“The commissioner shall establish prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality *under collective agreements or understandings between bona fide organizations of construction mechanics and their employers*. Such agreements and understandings, to meet the requirements of this section, shall not be controlled in any way by either an employee or employer organization.” (emphasis added)); *see also* Associated Builders & Contractors v. Dir., Dept. of Consumer & Indus. Services, 705 N.W.2d 509, 514 (2005) (citing *West Ottawa Schools*, 309 N.W.2d 220, 224) (“*The Legislature did not confer on the unions and the contractor/employers the power to set the prevailing wage rate for public contracts*. It merely adopted, as the critical standard to be used by the Department of Labor in determining prevailing wage, the wage rate arrived at through a collective bargaining process which is completely unrelated to and independent of the prevailing wage statute. The purpose of collective bargaining is not to set the wage scale for *public* projects but rather to set the wage scale for *all* construction projects.” (emphasis added)).

⁹⁴ *See* N.J. STAT. ANN. § 34:11-56.30 (West 2011); *see also* *Male v. Ernest Renda Contracting Co.*, 301 A.2d 153, 156 (App. Div. 1973) *aff’d*, 314 A.2d 361 (1974) (“Second, the number of collective bargaining agreements covering a particular type of work within each county are ascertained. Third, if there exists more than one collective bargaining agreement covering a particular type of work, he determines which agreement covers the majority of workers for a particular craft or trade. Fourth, the wage rate set forth in that collective bargaining agreement becomes the prevailing wage rate for that craft or trade in the county concerned.”).

⁹⁵ *See* N.Y. LAB. LAW § 220 (McKinney 2001) (“The ‘prevailing rate of wage,’ for the intents and purposes of this article, shall be the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed.”).

⁹⁶ *See* OHIO REV. CODE ANN. § 4115.05 (West 2007) (“For purposes of establishing the prevailing rate of wages, a labor organization that is a party to a collective bargaining agreement, contract, or understanding . . . that establishes wages for a trade or occupation typically employed on public improvements shall file with the director of commerce all relevant portions of any such agreement, contract, or understanding to which the labor organization is a party.”).

⁹⁷ *See* HAW. REV. STAT. § 104-2 (West 2008) (“The rates of wages which the director shall regard as prevailing in each corresponding classification of laborers and mechanics shall be the rate of wages paid to the greatest number of those employed in the State, the modal rate, in the corresponding classes of laborers or mechanics on projects that are similar to the contract work.”)

⁹⁸ *See* MINN. STAT. ANN. § 177.42 (West 2006) (“‘Prevailing wage rate’ means the hourly basic rate of pay plus the contribution paid to or for the largest number of workers engaged in the same

majority of workers in a particular trade in a given locality, but in the event there is not a majority rate, then the average of all available rates is used.¹⁰⁰ Rhode Island uses the federal Davis-Bacon rates, though ambiguous language in its statute suggests that is not the only option available.¹⁰¹

Aside from the method used to calculate the prevailing wage, Illinois has a comparatively strong version of the law in that it has no minimum value before the Act applies.¹⁰² Only eight of the other thirty-two states with prevailing wage acts in place have no threshold amount.¹⁰³ Other states, such as New Jersey, have relatively low threshold amounts.¹⁰⁴ But about half set the threshold above \$25,000, and some states set it much higher.¹⁰⁵ For example, Maryland has the highest threshold, requiring the prevailing wage to be paid only on jobs over \$500,000.¹⁰⁶

C. Applying Public Choice Theory to the Prevailing Wage Act

1. Agency Capture

The reluctance of IDOL to recognize a new category and to limit the data used in the calculation of the prevailing wage to wages paid on public works projects supports the theory that the department has been captured by organized labor. Roger Noll posits that “[m]ost regulatory issues are of deep interest to regulated industries, with a very substantial amount of income for these industries riding on the decision.”¹⁰⁷ Even though the general public has a stake that “may in

class of labor within the area . . .”); *see also In re Truck Rental Rate Effective December 20, 2004*, No. A06-638, 2007 WL 229101 (Minn. Ct. App. Jan. 30, 2007) (describing the survey process used to calculate prevailing wage rate).

⁹⁹ *See* MO. ANN. STAT. § 290.210 (West 2005); *see also* *Branson R-IV Sch. Dist. v. Labor & Indus. Relations Comm’n*, 888 S.W.2d 717, 725 (Mo. Ct. App. 1994) (upholding the constitutionality of the modal method of ascertaining the prevailing wage).

¹⁰⁰ WASH. REV. CODE ANN. § 39.12.010 (West 2012); *see also* *Lockheed Shipbuilding Co. v. Dep’t of Labor & Indus. for State of Wash.*, 783 P.2d 1119, 1123 (Wash. Ct. App. 1989).

¹⁰¹ *See* R.I. GEN. LAWS ANN. § 37-13-8 (West 2006) (“In making a determination, the director of labor *may* adopt and use such appropriate and applicable prevailing wage rate determinations as have been made by the secretary of labor of the United States of America in accordance with the Davis-Bacon Act.” (emphasis added)).

¹⁰² *See Dollar Threshold Amount for Contract Coverage Under State Prevailing Wage Laws*, U.S. DEPT. OF LABOR (Jan. 1, 2013), <http://www.dol.gov/whd/state/dollar.htm#.UKHZzOOe83Q>.

¹⁰³ *Id.*

¹⁰⁴ *Id.* New Jersey’s threshold is \$1000. California and Rhode Island have the same threshold, which is the lowest of all existing thresholds. A few others are similarly low, like the \$2000 threshold of Hawaii and Alaska. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ ROGER G. NOLL, *REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS* 41 (1971).

the aggregate be even higher . . . it is diffused among a large number of unorganized individuals.”¹⁰⁸ Consequently, an agency decision that is unfavorable to a special interest group is likely to be fought, while a decision that is against the interest of the general public is unlikely to irritate enough people for them to organize against it.¹⁰⁹ This gives agencies an incentive to give regulated interest groups a little more than they deserve.¹¹⁰

2. Concentrated Groups, Diffuse Groups, and Information Costs

Public choice theory has something to offer our understanding of the political dynamics of the Prevailing Wage Act. One need not accept the tenets of public choice generally to admit that this law is peculiarly within public choice’s purview. A fair description of the public choice approach has been offered by Daniel Farber and Philip Frickey: “A less grandiose version of the economic theory would simply postulate (1) that reelection is an important motive of legislators, (2) that constituent and contributor interests thereby influence legislators, and (3) that small, easily organized interest groups have an influence disproportionate to the size of their membership.”¹¹¹

The economic theory of legislation suggests that the political process creates a market for legislation, where politicians essentially auction off legislative protection for money or votes.¹¹² Concentrated groups tend to fare better than diffuse groups in the market for legislation for a number of reasons:

Fewness of members reduces transaction costs, increases the cost of free riding (by making it less likely that there will be anything to take a free ride on—i.e. each member is more important to the group’s success the fewer the members there are), increases the benefits of redistribution, and makes organized opposition less likely by reducing the cost per opponent.¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 33 (1991).

¹¹² See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 534 (6th ed. 2003).

¹¹³ *Id.* at 535; see also John O. McGinnis & Max Schanzbach, *The Case Against Public Sector Unions*, Hoover Institute (Aug. 1, 2010), <http://www.hoover.org/publications/policy-review/article/43266> (“Taxpayers are a classic example of a diffuse group whose influence in politics is far less than their numbers. Because each taxpayer is less likely to decide an election through his vote than he is to be hit by lightning on his way to the polls, a taxpayer rationally does not invest much in learning about government policies or the positions of the candidates. In contrast, public employee unions are a classic example of a concentrated group which can monitor

Organized labor, with its relatively homogenous agenda and forced political participation through collection of union dues, is a quintessential concentrated group.

Of course, the plaintiffs in *Beary* were members of a contractor's association, which functions almost exactly like a union and is thus equally susceptible to being characterized as a concentrated group. Undeniably, the contractor's association engaged in protracted litigation in *Beary* because it was in its economic interest to do so; it was not simply acting as a private attorney general. But it was not a purely private dispute. At issue was the use of public funds. The contractor's association sued over IDOL's alleged abuse of the authority delegated to it by the state to determine the rate of prevailing wages. Because taxpayers are the group supplying the money used to pay those wages, the department's artificial wage inflation through the use of figures provided to it by unions pits the interests of a concentrated group against those of a diffuse group of taxpayers. Another way the Act works against the interests of taxpayers becomes apparent when one considers the stakes of the *Beary* litigation for the contractor's association. At least one immediate interest is obvious: all of the contractors were subject to enforcement actions that carried potentially significant penalties for noncompliance with the Act.¹¹⁴ But it seems doubtful that they would go through all the trouble and expense of protracted litigation simply to avoid penalties and interest on back pay.

Rather, a more long-term interest also seems apparent. As noted, among the most upset about the prevailing wage are municipal governments.¹¹⁵ Landscaping contractors are significantly more likely to get municipal landscaping contracts if municipalities do not need to pay the prevailing wage on those contracts. Conversely, if they *are* required to pay prevailing wages on landscaping work, the municipalities are unlikely to hire landscaping contractors because they are not required to pay their own employees the prevailing wage to do the same work.¹¹⁶

the behavior of government officials. Public employee unions, by virtue of the dues they collect from members, possess war chests from which they can contribute to politicians who support their goals. These goals, not surprisingly, involve first and foremost accruing benefits for their members. It is an axiom of political science that politicians tend to reward concentrated groups at the expense of the public, because these groups can in turn provide the most rewards to them.”).

¹¹⁴ See *Beary Landscaping, Inc. v. Costigan*, 667 F.3d at 947, 949 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 354 (2012); see also 820 ILL. COMP. STAT. ANN. 130/11 (LexisNexis 2008).

¹¹⁵ See subpart III(A).

¹¹⁶ See 820 ILL. COMP. STAT. ANN. 130/3 (LexisNexis 2008) (“Only such laborers, workers and mechanics as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job, and laborers, workers and mechanics engaged in the transportation of materials and equipment to or from the site, but not including the transportation by the sellers and suppliers or the manufacture or processing of materials or equipment, in the execution of any contract or contracts for public works with any public body shall be deemed to be employed upon public works.”).

The perverse result is that municipalities are effectively precluded from hiring firms that have figured out how to do something efficiently and cheaply because the Act requires them to pay outside contractors more than state employees to do the exact same work. And, of course, more private employees would be paid if the state was not paying the bill.

3. Defining and Measuring the Prevailing Wage

The idea of agency capture and the disparate political impact of concentrated groups helps explain why the Illinois Prevailing Wage Act is so unique and how it is being used in a way that seems to favor special interests over the interests of the public generally. Justice Bowman's aside in *Illinois Landscape Contractors Ass'n v. Department of Labor* about what is to be used in the calculation of the prevailing wage is telling.¹¹⁷ It exemplifies the gap between "prevailing wage" as a term of art and the common-sense notion of what the prevailing wage is. Since that gap is the product of the peculiar way the wage is calculated, the Prevailing Wage Act amounts to a form of "legislative deception."¹¹⁸ When legislative deception is combined with the information costs voters face in learning about political issues, serious problems for democracy are created.

One might object to the idea that there could be a common-sense notion of what "prevailing wage" means because the concept is such an abstraction. But a universal notion or consensus on what "prevailing wage" means is not needed. What matters is that the phrase evokes something like a snapshot of the mean, median, or mode wage rate in a particular trade at a particular point in time, *and* that it does not rely solely only on wages paid for public works projects. Perhaps the most frustrating aspect of both Justice Bowman's opinion and the result in *Beary* is that the agency in charge of defining the prevailing wage chose to ignore real-world facts to keep the prevailing wage for landscapers artificially inflated. Thus, even though creating a new category for "plantsmen" would arguably have provided a more accurate picture of the labor market, IDOL chose to retain the existing classification of landscapers as "laborers."

Despite what looked like a *prima facie* case of agency capture, the result is still plausible under the statute. The burden is on the party proposing the new wage classification to establish that the work performed by those in the new

¹¹⁷ See *supra* notes 60–62 and accompanying text.

¹¹⁸ See Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 439 (2006) (symposium) ("In the case of [macro-level legislative] deception, in contrast, the legislature leaves substantive law unchanged on its face, but alters it in a generally applicable manner by enacting procedural or evidentiary modifications that have the effect of transforming the essence—or what can appropriately be described as the 'DNA'—of that law.").

classification is sufficiently dissimilar to the work involved in their existing laborer classification.¹¹⁹ The actual text of the decision is unavailable, but the summarized findings of the administrative law judge included the following:

(4) the burden is on the petitioner to establish the need for a new class or new wage; (5) the test is whether the petitioner has proved, by a preponderance of the evidence, that the work described in the proposed classification is sufficiently dissimilar to the work performed in the existing classification; (6) the testimony presented establishes that the work of landscapers falls under the classification of “laborer” because landscapers possess the same skills and knowledge and use the same tools as laborers; (7) there was no evidence establishing the number of hours laborers spend on landscape work for public works projects; and (8) the fact that the Landscape CBA exists does not mean that [I]DOL is obligated to recognize its new classes.¹²⁰

It is difficult to see why this should be the procedure. What makes very little sense about this process is that evidence that the U.S. Department of Labor (or any other jurisdiction) has a separate classification for “plantsman” is inadmissible because those jurisdictions use private wages in their calculations.¹²¹

D. Counter-Arguments

1. The Prevailing Wage Act as Labor Subsidy

A potential counter-argument to this analysis is that the law might be viewed as a form of subsidy or welfare, and therefore has a legitimate purpose.¹²² For instance, some contend that the Davis-Bacon Act was a Keynesian stimulus program.¹²³ A more recent example is President Barack Obama’s signature stimulus legislation, much of which involved funding for federal public works

¹¹⁹ 820 ILL. COMP. STAT. 130/9 (2008).

¹²⁰ Ill. Landscape Contractors Ass’n v. Dep’t of Labor, 866 N.E.2d 592, 599 (Ill. App. Ct. 2007).

¹²¹ See *id.* at 596 (IDOL “cannot consider USDOL determinations, because USDOL uses both public and private hours when it determines federal wages pursuant to the Davis–Bacon Act.”).

¹²² See Glassman, *supra* note 14 (“One feature of public construction projects that the critics seem less willing to recognize, however, is that they function also as a costly welfare system for union workers. This feature stems from the federal Davis-Bacon Act, under which construction projects funded entirely or in part by the federal government must pay a government determined “prevailing wage” to the workers on the project.”).

¹²³ See, e.g., Northrup & White, *supra* note 10, at 80.

projects.¹²⁴ It has thus been argued that the extraordinary compensation laborers are receiving for public works projects is a form of stimulus. Some proponents have pointed out that critics of the Davis-Bacon Act (and, by implication, prevailing wage acts generally) tend to think construction workers are overpaid, although this is not the case because they often do not work the entire year.¹²⁵

However, this argument presents serious problems for democratic theory. If the rationale of the law is stimulus, but that rationale is achieved under the guise of the “Prevailing Wage Act,” then voters are being misled. The stated purpose of the Act is to ensure that the public works will be completed “without interruptions or delay by workmen of average skill.”¹²⁶ A second purpose of the act commonly cited is that it protects local workers by removing the incentive to import inexpensive labor from outside the area where the work is being done.¹²⁷ Voters who might support the law under those rationales may feel differently if the legislation were described as the labor subsidy that it actually is.

Public choice theorists and economists have observed for decades that there is little incentive for voters to learn much about the decisions their representative make before going to the polls.¹²⁸ Using a law to do something other than its stated purpose compounds this problem and gives legislators a way to transfer money from a diffuse group of voters to the more concentrated group of laborers on public works projects. If the people of Illinois decide that labor is in such poor shape that it merits a subsidy, they should pursue a subsidy directly instead of the roundabout way of a prevailing wage.

2. The Race to the Bottom

Proponents of prevailing wage laws also contend that they prevent governments from engaging in myopic cost-cutting, which would thereby cause a race to the bottom in the construction industry and ultimately damage the community:

¹²⁴ See generally David Firestone, *Don't Tell Anyone, But the Stimulus Worked*, N.Y. TIMES, Sept. 16, 2012, at 10.

¹²⁵ Micheal Bruton, *No Profit in Repealing Davis-Bacon*, CHI. TRIB., May 23, 1995, http://articles.chicagotribune.com/1995-05-23/news/9505230174_1_davis-bacon-act-hourly-wage-rates-repeal (“Proponents of repeal seem to believe that construction workers are grossly overpaid, costing the government billions of dollars a year. But the average construction worker makes about \$578 a week, which amounts to \$30,058 a year, assuming he or she is lucky enough to actually work 50 weeks a year, which most don’t.”).

¹²⁶ Letter from Roland Burris, Illinois Attorney General, to Shinae Chun, Director of the Illinois Department of Labor (Mar. 29, 1993), *available at* <http://illinoisattorneygeneral.gov/opinions/1993/93-009.pdf>.

¹²⁷ *Id.*

¹²⁸ See, e.g., POSNER, *supra* note 112.

Prevailing wage laws emerged from a concern that cutthroat competition over wages in construction would lead the industry down a low-wage, low-skill development path. This was said to put the quality of construction at risk and lead to an itinerant, footloose low-wage construction labor force. Poor construction workers would make poor neighbors and potential burdens on the community. Reasonably paid construction workers, on the other hand, held out the possibility of being solid neighbors, good citizens and productive members of the community. Government, by the operation of prevailing wage laws, was supposed to get out of the business of cutting government costs by cutting the wages of its citizens. Whatever labor standards had been established, whatever wages prevailed in a local community, that is what the law said government should pay on public works.¹²⁹

Joseph Costigan, former director of IDOL and the defendant in *Beary* by virtue of the position, advanced a form of this argument while in office.¹³⁰

Nonetheless, this argument finds its refutation in the many workers who receive lower-than-prevailing wages every day; they have not yet caused the social fabric of Illinois to disintegrate. Furthermore, as George C. Leef points out, “allowing contractors to employ workers who will accept less than the ‘prevailing’ wage does not ‘drive down’ wages. It simply means that construction workers who are usually paid at the union scale will not always be employed on government projects.”¹³¹ Needless to say, the parade of horrors that this argument suggests would transpire in the absence of prevailing wage acts is impossible to prove empirically. It is nothing more than a naked political argument, unsupported by fact.

3. No Impact on Costs

Yet another argument advanced in support of prevailing wage laws is that they have no inflationary impact on costs.¹³² This argument also is almost entirely without empirical support, and is based on just one study about a supposedly

¹²⁹ HAMID AZARI-RAD ET. AL., *THE ECONOMICS OF PREVILING WAGE LAWS* 23 (2005).

¹³⁰ Pat Barcas, *Costigan: Best Defense for Workers is a Good Offense*, FOX VALLEY LAB. NEWS, Feb. 3, 2012, <http://foxvalleylabornews.com/2012/02/03/costigan-best-defense-for-workers-is-a-good-offense/> (“At the department, we see the low road taken a lot. People who don’t pay prevailing wage, or miss-categorize [*sic*] independent contractors. These people don’t care. It’s a race to the bottom. . . . Values that I call high road values help both contractors and workers. We’re all in this together [*sic*]. Help each other, and this helps you.”).

¹³¹ Leef, *supra* note 4, at 149.

¹³² See, e.g., AZARI-RAD, *supra* note 129.

comparative labor law in British Columbia.¹³³ In fact, the majority of the evidence is to the contrary. Leef describes inflation of the cost of public construction as the “most salient effect” of prevailing wage legislation.¹³⁴ He cites four main ways prevailing wage acts increase costs: preventing competitive bidding on the cost of labor; interference with efficient labor utilization as a consequence of mandated adherence to union work rules; the imposition of additional costs of compliance; and the added costs of administering the regulation—including the costs of litigation against contractors.¹³⁵

Michigan provides a great natural experiment in the effect of prevailing wage laws. A district court declared Michigan’s robust prevailing wage law to be preempted in 1994 by the Employee Retirement Income Security Act.¹³⁶ This decision was reversed by the Sixth Circuit in 1997, so the period between the two decisions provided ample data for economists to study the effect of Michigan’s prevailing wage on the cost of public construction.¹³⁷ Unsurprisingly, non-union contractors substantially underbid union contractors for many public construction jobs.¹³⁸ Economist Richard Vedder concluded that, in 1995 alone, Michigan “saved approximately \$275 million in construction outlays because competitive bidding prevailed rather than the ‘prevailing wage’ law.”¹³⁹

Even if these arguments did support the continued existence of the Davis-Bacon Act and other prevailing wage laws, they do little to justify Illinois’ unique approach to the law. Recall again the disparity between the required rate of pay on a federal project and the Illinois project cited by Judge Zagel.¹⁴⁰ Studies like this may justify the federal rate of wage or states that have something close to union scale, but they do not support IDOL’s current method of calculating the rate, which keeps the subsidization of labor at a comparatively high level. In contrast, creating a new category of “plantmen” and allowing the use of private wages to figure out the prevailing wage rate for that category would save the state a considerable amount of money. Furthermore, even if the amount of money saved by the new category would equate to only a small fraction of the state’s deficit, it is still taxpayer money being wasted.

¹³³ *Id.*

¹³⁴ Leef, *supra* note 4, at 140.

¹³⁵ *Id.*

¹³⁶ *Id.* at 141.

¹³⁷ *Id.*

¹³⁸ *Id.* (noting that Michigan’s prevailing wage has historically been union scale.).

¹³⁹ *Id.*

¹⁴⁰ *Beary Landscaping, Inc. v. Shannon*, 2011 WL 1100213, at *3 (N.D. Ill. 2011), *aff’d sub nom.*, *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 354 (2012).

CONCLUSION

The challenge to the Prevailing Wage Act in *Beary* was defeated on sound constitutional grounds. But the *Beary* decision, and the efforts of Illinois landscaping contractors more generally, shed light on problems with the Act that should be remedied. Ideally, the legislature will fix these problems by scrapping the Prevailing Wage Act in its entirety and replacing it with a new law that is more narrowly aimed at achieving the ends the Act purportedly serves. But if such action proves legislatively impossible, taxpayers should oppose the insidious expansion of the Act and demand that legislators institute more modest reforms such as limiting application of the Prevailing Wage Act to jobs above a certain dollar threshold. Illinois can ill-afford the bureaucratic waste engendered by the Prevailing Wage Act in its current state.